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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHESTER A. WILK, D.C.; JAMES W. BRYDEN, D.C.; PATRICIA B. ARTHUR, D.C.; STEVEN G. LUMSDEN, D.C.; and MICHAEL D. PEDIGO, D.C.

Petitioners,

v.

AMERICAN MEDICAL ASSOCIATION, AMERICAN HOSPITAL ASSOCIATION, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF PHYSICIANS, JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, AMERICAN COLLEGE OF RADIOLOGY, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, ILLINOIS STATE MEDICAL SOCIETY, H. DOYL TAYLOR, JOSEPH A. SABATIER, M.D., H. THOMAS BALLANTINE, M.D., and JAMES H. SAMMONS, M.D.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals erred in ruling that respondent medical associations and their members may conspire to and implement a nationwide boycott of all licensed doctors of chiropractic by all medical doctors and accredited hospitals by the use of codes of ethics and accreditation standards and thus prohibit defendants' members, and hospitals controlled by them, from all voluntary professional associations with chiropractors so as to "contain and eliminate" the profession of chiropractic and, on balance, significantly injure competition within the meaning of the Sherman Act, yet escape liability under the Rule of Reason by justifying their conduct on the basis of their concern for public health and welfare by demonstrating:

> (1) that they genuinely entertained concern for what they perceive as scientific method in the care of each person with whom they (sic)[1] have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.[2]

Pet. App. 34-35.

2. Whether the court of appeals erred in refusing to follow the majority opinion of this Court in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), and, instead, in relying on a two judge "dissent" in that case to announce that it was free to fundamentally "modify the Rule of Reason test" under Section 1 of the Sherman Act, 15 U.S.C.

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[1] The respondent associations have no patients—only their members can have patients.

[2] Even if, theoretically, the respondents' actions achieved their intended purpose of total elimination of the state licensed profession of chiropractic consisting of more than 23,000 chiropractors.

§ 1, to allow a significant restraint of competition to be justified by the purported good motives of professional associations whose members compete with the victims of the anticompetitive conduct. Pet. App. 33.

3. Whether the court of appeals erred in ruling that a horizontal group boycott by medical doctors intended to eliminate the competitive, state licensed health care profession of chiropractic and exclude doctors of chiropractic from competing against medical doctors in various health care markets, may escape the *per se* rule of illegality because the perpetrators are medical doctors who profess to be motivated by concerns for patient care and therefore "should be viewed and treated differently in the circumstances peculiar to a learned profession." Pet. App. 24.

4. Whether the court of appeals erred in ruling that evidence of the respondent medical associations' success in secretly "fixing" a supposedly "impartial" fact finding study by a body of experts as part of an effort to eliminate a competitive health care provider, which study ultimately formed the basis for a report by the Secretary of Health, Education and Welfare requested by Congress, was exempt from Sherman Act coverage by reason of the *Noerr-Pennington* doctrine, Pet. App. 38-39, notwithstanding the contrary ruling of the Court of Appeals for the District of Columbia that "no actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." *Israel v. Baxter Laboratories, Inc.*, 466 F. 2d 272, 278 (D.C. Cir. 1972).

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I. W. Lazarus, E. Levine, and L. Levin, *Competition Among Health Care Providers* pp. II58-59 (February, 1981) 14, 15

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II. REPORT OF OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 719 F.2d 207 (7th Cir. 1983). A Supplemental Order of seven pages, issued on October 25, 1983, is unreported but appears in Petitioners' Appendix ("Pet. App.") attached hereto.

III. GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court has jurisdiction under 28 U.S.C. section 1254(1) and 28 U.S.C. section 2101(c). The Judgment of the United States District Court for the Northern District of Illinois based on a jury verdict was entered on January 30, 1981. Pet. App. 56-57. The court of appeals' Judgment and Opinion were entered on September 19, 1983, Pet. App. 1-49, with a Supplemental Opinion and Order being entered on October 25, 1983, Pet. App. 50-54. All Petitions for Rehearing with Suggestions for Rehearing *en banc* were denied by the court of appeals on December 1, 1983. Pet. App. 55.

IV. STATUTES INVOLVED

The Sherman Act and Clayton Act statutes involved are printed in Pet. App. 79-82.

V. STATEMENT OF THE CASE

Petitioners, five doctors of chiropractic, brought this action under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, as amended, to challenge a nationwide horizontal group boycott by respondents and their members designed to "contain" and "eliminate" the entire profession of chiropractic. See Pet. App. 75.

Jurisdiction was grounded on 28 U.S.C. section 1337. On January 30, 1981, following an eight week trial, a jury returned a verdict in favor of respondents. On September 19, 1983, the judgment entered on the verdict was reversed and the case remanded for a new trial by the United States Court of Appeals

for the Seventh Circuit, Pet. App. 1-47, which cited improper jury instructions and the improper admission of prejudicial evidence.

The court of appeals, in reversing, held that upon retrial: (1) that the Rule of Reason which this Court has adhered to for over sixty years should be modified[3] to allow defendants to justify a significant injury to competition on the basis of genuine concern for patient care; (2) that no *per se* instruction should be given because the case involves canons of medical ethics and defendants' purported "patient care motive"; and (3) that defendants' *sub rosa* efforts to distort and fix an allegedly unbiased report by the Secretary of HEW, which was requested by Congress, was exempt from Sherman Act coverage under the *Noerr-Pennington* doctrine "if the defendants undertook such efforts to influence governmental bodies with a sincere purpose to obtain the governmental actions they sought." Pet. App. 39.

These rulings are directly at variance with controlling precedent of this Court and with rulings of other circuit courts of appeal.

A. The Parties

1. Petitioners

Petitioners Wilk, Bryden, Arthur, Lumsden, and Pedigo are doctors of chiropractic duly licensed to practice that profession by the States of Illinois, Missouri, Colorado, Michigan, and California respectively. Chiropractors are health care professionals who compete against medical doctors in the treatment of certain physical disorders. As the court of appeals stated:

> Chiropractic is a health care service. Its primary therapeutic tool is spinal manipulation. Chiropractors and medical doctors treat some of the same medical problems. Chiropractors would treat some patients in health care facilities and would use hospital x-ray and laboratory services if such treatment and use was permitted.

Pet. App. 6 (footnote omitted).

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[3] "We hold that the district court and we are free to modify the rule of reason test in a case involving a certain kind of question of ethics for the medical profession. . . ." Pet. App. 32.

More than 23,000 chiropractors are licensed in the U.S. and chiropractors practice in all fifty states. There were approximately 130,000,000 patient visits to chiropractors in 1979 and between 800 and 850 million dollars were spent for chiropractic services. Approximately $30,000,000 in Federal Medicare payments were made for chiropractic services between July 1977 and September 1978.

2. Respondents

Respondents are the American Medical Association, a national professional association for medical physicians ("AMA"); the American College of Surgeons, a national professional association for surgeons ("ACS"); the American College of Physicians, a national professional association for internists ("ACP"); the American Academy of Orthopaedic Surgeons, a national professional association for orthopaedic surgeons ("AAOS"); the American College of Radiology, a national professional association for radiologists ("ACR"); the Illinois constituent body of the AMA ("ISMS"), the American Hospital Association, a national trade association for hospitals ("AHA"); the Joint Commission on Accreditation of Hospitals ("JCAH"), a national, privately owned and sponsored hospital accreditation body, the sponsors of which are, and the commissioners of which are appointed by, respondents AMA, AHA, ACS, and ACP. The four individual respondents were directly involved in formulating and implementing a nation-wide AMA program, joined in by the other respondents, which had as its "prime mission ... first, the containment of chiropractic and ultimately, the elimination of chiropractic." Pet. App. 6.

B. The Boycott

The court of appeals' Opinion of September 19, 1983, Pet. App. 4-12, and the Supplemental Order of October 25, 1983, Pet. App. 52-53, set forth the means by which each of the respondents participated in the plan, conceived by the AMA, to isolate doctors of chiropractic from all interprofessional and interinstitutional cooperation and contact. Many of the respondents' overt acts were publicly observable, while others

were *sub rosa* or covert.[4] But all were designed to eliminate chiropractors from the health care markets in which they compete against medical doctors. Set forth below are the principal devices used by respondents to boycott chiropractors.

1. Boycott of Interprofessional Association Between Medical Doctors and Chiropractors

There are no laws barring professional cooperation or association between state licensed medical physicians and state licensed doctors of chiropractic acting within the scope of their respective licenses. The AMA, however, formally declared that chiropractic was an "unscientific" discipline and that it was unethical for a medical physician who wished to professionally deal with chiropractors to do so. As a consequence, all professional cooperation or association between medical physicians and doctors of chiropractic such as consultations, referrals, joint research, shared academic and clinical experiences, joint care of patients, teaching at chiropractic colleges, taking x-rays for chiropractors, and doing lab work for chiropractors were forbidden. The court of appeals stated that the AMA coordinating committee for the boycott sent "letters warning medical boards and associations that professional cooperation and association between chiropractors and physicians were unethical and attempting to discourage colleges, universities, and faculty members from cooperating with chiropractic schools." Pet. App. 7-8.

2. Boycott of Institutional Support Services for Chiropractors

Respondents AMA, ACP, ACS and AHA, the sponsors of respondent Joint Commission On Accreditation of Hospitals ("JCAH"), utilized the JCAH as a vehicle to bar chiropractors from access to hospitals and hospital support services. The court of appeals summarized this evidence by stating:

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[4] For example: "The [AMA] committee has not submitted such a report [earlier] because it believes that to make public some of its activities would have been and continues to be unwise. Thus, this report is intended only for the information of the [AMA] Board of Trustees." Pet. App. 7 n. 5; Pet. App. 75.

> JCAH staff members replied to letters from hospitals on chiropractors by asserting that a hospital permitting chiropractors to use its services, such as laboratory testing and x-rays, would endanger its status as an accredited institution, even if a state passed a law requiring hospitals to allow chiropractors to be staff members.

Pet. App. 8-9. As a result any hospital which permitted a chiropractor to be on its staff or even provided him with x-ray or lab services jeopardized its commercially invaluable accreditation.

In addition, the court of appeals stated:

> [T]here were no laws in effect during the time relevant to this lawsuit that prohibited chiropractors from furnishing care in hospitals under the supervision of a medical staff member, nor were there laws preventing hospitals from providing x-rays or laboratory services to chiropractors or preventing hospital x-ray departments or radiologists from making x-ray films or copies of x-rays available to chiropractors at the request of their patients.

Pet. App. 6. Nonetheless, at the request of the AMA committee that organized the boycott, the general counsel's office of the AMA published in the Journal of the American Medical Association a "legal opinion" entitled "The Right and Duty of Hospitals to Exclude Chiropractors." See Pet. App. 9.

3. Boycott of Health Insurance for Services of Chiropractors

The boycott included working with national insurance companies, such as Blue Shield and the Health Insurance Association of America ("HIAA"), a national trade association of insurance companies, to discourage or impede insurance coverage for services provided by chiropractors. For example, as set forth in the AMA boycott coordinating committee documents:

> d. CHIROPRACTIC COVERAGE UNDER BLUE SHIELD—[AMA] Staff will continue to maintain liaison with the National Association of Blue Shield Plans in regard to chiropractic attempts to gain coverage under

> Blue Shield. (NOTE: A productive meeting was held with representatives of Blue Shield on this point. They are actively considering various methods of *excluding* chiropractors from Blue Shield coverage.)

Plaintiffs' Exhibit ("PX") 273 (emphasis added). In subsequent Blue Shield documents there appears, "Resistance to chiropractic payment may be indicated by the fact that fewer [Blue Shield] Plans make payment *than the laws require.*" PX 429, p. 2 (emphasis added).

4. Boycott of Providing X-Ray Services to Chiropractors or Their Patients

The American College of Radiology, in conjunction with its general participation with the AMA boycott, declared it to be unethical for radiologists to submit already existing x-ray films of a patient or other medical records to a chiropractor or even to the patient to be conveyed to a chiropractor. As a result a patient who had already been x-rayed by a medical doctor had to either submit to additional x-rays or refrain from seeking chiropractic care.

5. Consequences of the Boycott

The court of appeals ruled that there was evidence that:

> Through such mechanisms, individual physicians were discouraged from cooperating with chiropractors in: patient treatment, because referrals were inhibited by defendants' activities; research; and educational activities, such as sharing clinical experience and research results. Chiropractors were denied access to the hospital facilities they considered necessary to practice their professions. Medical doctors were discouraged from aiding chiropractors in interpreting electrocardiograms. Requests by individual plaintiffs to use laboratory and x-ray facilities were not granted; requests for hospital in-patient privileges were similarly denied. Referrals from medical doctors were reduced. Public demand for chiropractic services was negatively affected. (Pet. App. 8.)

An attorney for the Judicial Council of the American Medical Association, in writing to the member who had suggested easing the AMA's ban on cooperation with chiropractors, stated, "The facts are that chiropractic has not grown in number under existing policy, whereas there is every evidence to believe that it would grow if AMA policy decisions were relaxed." PX 253, Pet. App. 65.

C. Interference With Fact Finding Body

In 1967 Congress asked the Secretary of the Department of Health, Education and Welfare to have an unbaised study conducted to determine the need for including coverage for chiropractic services under the Medicare Act. PX 239, Pet. App. 72. Petitioners presented evidence that respondent AMA secretly subverted this Report by working with medical physician members of HEW and of the Expert Review Panel to develop conclusions negative to chiropractic even before the study commenced. As a result, more than five months before the study was begun, an AMA member who was a consultant to HEW was able to report complete acceptance by an HEW consultant group "of the concept of preparing the decision on the basis of lack of scientific merit." PX 1414, Pet. App. 69.

Because of sensitivity to discovery by Congress, the AMA informed the AMA member that was a consultant to HEW that the "AMA hand must not show" in the chiropractic study. PX 220.

Another AMA member who was on the Expert Review Panel secretly informed the AMA which panelists were "soft" on chiropractic, PX 1579, and then the AMA secretly contacted those panelists "to coach" them. PX 482, Pet. App. 70. The panelists were told that

> the American Medical Association has stated that it is unethical for a physician to refer a patient to these [chiropractors] and likewise could be expected to voice strong opposition [to inclusion of chiropractors under Medicare]. Even if such a proposal became law, its implementation would require mass and open defection on

the part of medical doctors from the policies of its own association. (PX 702A, p. 12).

When Congress asked HEW to respond to a charge that the resulting negative Report had been "fixed" by secret AMA involvement, the individuals at HEW that had worked with the AMA informed Congress that the advisory group had neither heard nor considered "material from any group other than those being studied. . . ." PX 239, p. 5, Pet. App. 73. This was transparently false. As a result of the negative Report of the supposedly impartial Panel, Congress delayed including chiropractic services in Medicare for five more years. Moreover, the negative Report itself became a basic AMA public relations document used in justifying and convincing others to join the national, private boycott of chiropractors. *E.g.*, PX 1397.

D. Legal Rulings By the Court of Appeals

1. The Rule of Reason

The court of appeals acknowledged that in *National Society of Professional Engineers v. United States*, 435 U. S. 679, 691 (1978), this Court relied on *Chicago Board of Trade v. United States*, 246 U. S. 231 (1918), for the proposition that for 60 years it has "adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promoted competition or one that suppresses competition." Pet. App. 24. Nevertheless, relying on a two judge "dissent" authored by Justice Blackman in *Professional Engineers*, the court of appeals held that it was "free to modify the Rule of Reason test in a case involving a certain kind of question of ethics for the medical profession. . . ." Pet. App. 33. Accordingly, the court of appeals held that the Rule of Reason would not necessarily be violated even if petitioners met the age old test that competition was on balance suppressed by the boycott. Rather, the court of appeals held that even a significant injury to competition could be justified if respondents "meet their burden" of proving that they were

motivated by a genuine concern for patient care. Pet. App. 35. The court of appeals candidly admitted that it was weighing public policy goals other than competition as part of the Rule of Reason analysis. The court stated, at Pet. App. 34:

> A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds. Because Congress has for so long assigned such pronounced value to freedom of competition and the Supreme Court has for so long applied the rule of reason so as virtually to exclude other values (except, for example, the value of activity protected by the first amendment), the adaptation of the rule of reason in the Principle 3 setting should impose a heavy burden on those who would justify conduct having significant anticompetitive effect.

2. The *Per Se* Rule

The court of appeals recognized that as recently as *Arizona v. Maricopa County Medical Soc'y*, 457 U. S. 332, 349-51 (1982), this Court had approvingly quoted from *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1, 5 (1958), "Among the practices which the courts have heretofore deemed to be *unlawful in and of themselves* are price-fixing, division of markets, *group boycotts*, and tying arrangements." Pet. App. 22 (emphasis added). The court of appeals, nevertheless, set out a new limitation on *per se* rules holding, as a matter of first impression,[5] that only price fixing or boycotts to enforce price fixing constitute *per se* offenses. Specifically the court held "that boycotts are illegal *per se* only if used to enforce agreements that are themselves illegal *per se*—for example, price-fixing

[5] The Court relied on two cases. Pet. App. 23. One *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F. 2d 781, 787-90 (7th Cir. 1981), does not even remotely support the court's holding. The other case, *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F. 2d 1488, 1495 (7th Cir. 1983) (opinion vacated July 19, 1983), had been vacated by the grant of a Petition for rehearing *en banc* prior to the rendering of the appellate decision herein.

agreements." Pet. App. 23. The court of appeals here found that:

> The evidence was that the compulsion to be exerted upon medical doctors, hospitals, x-ray facilities, and laboratories through the conspiracy, if the jury found there was such intended compulsion, was to engage in the boycott itself, and not to exert, through boycott, compulsion upon any one to do or to refrain from doing anything else.

Pet. App. 23. In addition, the court of appeals created a new and unprecedented rule of law by concluding that "because of evidence of the 'patient care motive' " for the boycott, petitioners are not entitled to a *per se* instruction. Pet. App. 23.

3. Interference With Fact Finding Body—Application of the *Noerr-Pennington* Doctrine

Finally, the court of appeals decided that respondents are insulated from any antitrust consequences for "fixing" the HEW appointed Expert Review Panel or its Report if the respondents were "sincere" in seeking the government actions they sought. Pet. App. 39-40. Petitioners had objected that the instruction was erroneous in view of the ruling of the Court of Appeals for the District of Columbia in *Israel v. Baxter Laboratories, Inc.*, 466 F. 2d 272, 278 (D. C. Cir. 1972), that: "No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption."[6] See Petitioners' Proposed Instruction 55, Pet. App. 61. Nevertheless, notwithstanding substantial evidence of a "fix," the court of appeals approved a *Noerr-Pennington* instruction, A44, Pet. App. 59, that reads:

> I charge you that none of these activities directed toward influencing legislators or other public officials may be considered by you as a violation of the antitrust laws, provided you believe the defendants undertook such ef-

[6] The *Israel* case closely tracks the language of this Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972): "There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations."

forts to influence governmental bodies with a sincere purpose to obtain the governmental actions that they sought.

Under the circumstances, the instruction clearly grants antitrust insulation to those who sincerely defraud or fix government study panels or Expert Review Panels and then subsequently use the ill-gotten product in furtherance of a national private boycott.

VI. DISCUSSION

A. The Court of Appeals' Modification of the Rule of Reason Is in Direct Conflict With the Decisions of This Court and Other Courts of Appeal

The court of appeals acknowledged that it was departing from the "single standard" under the Rule of Reason that has been followed by this Court for over 60 years. In a special accommodation to certain health care trade associations and the medical profession the court ruled, Pet. App. 32, 34-35:

> We hold that the district court and we are free to modify the rule of reason test in a case involving a certain kind of question of ethics for the medical profession. . . .
>
> . . . .
>
> . . . A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds. *Because Congress has for so long assigned such pronounced value to freedom of competition and the Supreme Court has for so long applied the rule of reason so as virtually to exclude other values. . .*, the adaption of the rule of reason in the Principle 3 setting should impose a heavy burden on those who would *justify conduct having significant anticompetitive effect.*
>
> The jury should be instructed in appropriate language to the following effect: The burden of persuasion is on the plaintiffs to show that the effect of Principle 3 and the implementing conduct has been to restrict competition rather than to promote it. If the plaintiffs have met this burden, the burden of persuasion is on the defendants to

> show: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.
>
> ... Only if the defendants ... meet their burden, as described, does their conduct escape condemnation as unreasonable. (Emphasis added.)

In making its modification of the Rule of Reason the court of appeals gave respondents a new antitrust defense never sanctioned by Congress or by this or any other court[7] and directly counter to this Court's previous rulings.

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[7] In a Report prepared for the F. T. C. is found the following:

> A few lower courts, doubting the premise that competition would be desirable, have been reluctant to give full effect to the law's implications in the health care sector. But legal experts suggest it may be only a matter of time before it is made clear that judges are not to decide whether competition is good or bad or works well enough to be encouraged but only whether it has been unreasonably impaired. If that occurs, the result would be that the medical profession would be barred from engaging in certain conduct which traditionally has been undertaken by the profession.
>
> Many of the professional activities that are open to legal challenge may represent sincere efforts to raise standards and protect the public and may not have been designed or specifically intended to suppress competition or enhance anyone's market power. Professor Havighurst has discussed the somewhat delicate juxtaposition of professional and antitrust values which are raised in such circumstances:
>
> ... [A]n assertion that the antitrust laws have been violated does not always call into question the motives of the people involved or attribute to them a conspiratorial intent to suppress competition and to enrich themselves at the consumer's expense. The point may simply be that particular concerted actions,

(footnote continued on following page)

In *Professional Engineers*, the defendants attempted to justify anticompetitive canons of ethics on the basis that they were necessary to protect public health and safety. This Court made it clear that such a defense (accorded respondents in this case) could only be obtained from Congress:

> The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; *United States v. Joint Traffic Assn.*, 171 U.S. 505, 573-577, 19 S.Ct. 25, 33-34, 43 L.Ed. 259. *That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries,* but it is not permitted by the Rule of Reason. As the Court observed in *Standard Oil Co. v. United States*, 221 U.S., at 65, 31 S.Ct., at 517, 'restraints of trade within the purview of the statute . . . [can]not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wis-

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(footnote continued from previous page)

> however well motivated they may have been, are inconsistent with the competitive norm. On this basis alone, they may be declared unlawful. This means that the antitrust laws may be successfully invoked against traditional practices and institutions of the medical profession without impugning the motives either of the profession as a whole or of the dedicated professionals who have sought to improve the profession's performance. That society now seeks a better mode of social control over this industry and invokes the antitrust laws to achieve it requires no apology by either the enforcement agencies or the profession whose traditional practices are questioned. Perhaps these observations will help physicians view antitrust enforcement less as an attack on their profession's integrity than as an attempt to invoke the neutral principles of the free enterprise system as a better answer to real problems than . . . regulatory solutions would be.

I, W. Lazarus, E. Levine, and L. Levin, *Competition Among Health Care Providers* pp. II58-59 (February, 1981) (footnotes omitted) (quoting Havighurst, *The Antitrust Laws, the Federal Trade Commission, and Cost Containment*, 56 Bul. of N.Y. Acad. of Med. 169, 187-88 (1980)).

> dom or want of wisdom of the statute which prohibited their being made.'

435 U. S. at 689-90 (footnotes omitted, insertion in original, emphasis added).[8]

This Court, in *Professional Engineers*, made it clear that, "[t]he test prescribed in *Standard Oil* is whether the challenged contracts or acts 'were unreasonably restrictive of competitive conditions.' " 435 U. S. at 690. "[T]he inquiry is *confined* to a consideration of impact on competitive conditions." *Id.* (emphasis added).

In making its dramatic departure from the Rule of Reason, that only exists in the decision below, the Seventh Circuit ruled that instead of looking only to whether competition was restrained, one must include, within the Rule of Reason analysis, values *independent of competition*. The court stated, "A value independent of the values attributed to unrestrained competition must enter the equation. The reasonableness of any resulting restraint on competition must be determined by a reconciliation of values of differing kinds." Pet. App. 34.

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[8] The Court of Appeals for the District of Columbia in *American Medical Ass'n v. United States*, 130 F.2d 233, 248 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943) (emphasis added), told respondent AMA that it must look to the legislature before it could engage in anticompetitive behavior:

> But there is a clearly defined line of demarcation here which must be observed if the penalties of the Sherman Act are to be avoided. As we suggested in our earlier opinion, appellants have open to them always the safer and more kindly weapons of legitimate persuasion and reasoned argument, as a means of preserving professional esprit de corps, winning public sentiment to their point of view or securing legislation. But they have no license to commit crime. When they go so far as to impose unreasonable restraints, they become subject to the prohibition of the Sherman Act. This then, represents a limit to professional group activities. If it is desired to extend them beyond this point, legislation is required for that purpose. *It may be desirable that this professional group shall be given such enlarged powers, but if so it will be necessary for the legislature to speak upon the subject rather than for the courts to recognize a privilege based upon preemption or usurpation.*

The court of appeals has thus launched into the morass of having a judge or jury make policy determinations that have traditionally been made by legislatures or expert regulatory agencies. *See, U.S. v. Trenton Potteries,* 273 U.S. 392 (1927).

The sortie into forbidden territory directly contradicts the ruling in *Professional Engineers,* 435 U.S. at 688, 691-92:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. *Instead, it focuses directly on the challenged restraint's impact on competitive conditions.*
>
> . . . .
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> In this respect the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in *Continental T.V., Inc., the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.* 'The true test of legality is whether the restraint imposed is such as merely *regulates and perhaps thereby promotes competition* or whether it is such as may *suppress or even destroy competition.*' 246 U.S., at 238, 38 S.Ct., at 243, quoted in 433 U.S., at 49 n. 15, 197 S.Ct., at 2557.
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> . . . [T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; *it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.* (Emphasis added.)

The "independent value" that the Seventh Circuit included within the Rule of Reason analysis was labeled "patient care motive." Pet. App. 33. Accordingly, the court recommended the use of the following instructions, Pet. App. 34-35:

> The jury should be instructed in appropriate language to the following effect: The burden of persuasion is on the

> plaintiffs to show that the effect of Principle 3 and the implementing conduct has been to restrict competition rather than to promote it. If the plaintiffs have met this burden, the burden of persuasion is on the defendants to show: (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.

However, the respondent medical trade associations have no patients. Thus it is difficult to understand how respondent associations could have a patient care motive for "each person with whom they have entered into a doctor-patient relationship." Pet. App. 34. The only possible reason for incorporating private views on patient care into trade association ethics standards is to bring "others" into conformity—thus presumptively admitting that all medical physicians did not share or practice the private point of view. If they did there would be no reason for the ethics restraint or boycott enforced by the professional societies.

More important, however, the Seventh Circuit's "patient care motive" instructions are contrary to controlling precedent and constitute nothing short of a "health, welfare and safety" defense traveling under an alias. In *Professional Engineers* the defendant sought to justify a restraint on competition caused by its canons of ethics on the basis of public health and safety. This Court held the proferred defense "rests on a fundamental misunderstanding of the Rule of Reason" and stated that the attempt to pass muster under the Rule of Reason "on the basis of the potential threat that competition poses to the public safety and ethics of its profession is nothing less than a frontal

assault on the basic policy of the Sherman Act." 435 U. S. at 681, 695. This Court continued, *id.*, at 695-96.

> The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. *Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute.* In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. *The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.* (Emphasis added.)

In *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F. 2d 476, 484 (4th Cir. 1980), *cert. denied*, 450 U. S. 916 (1981), the district court had held that a medical boycott was justified, in part, because it "enhanced the supervisory process" between M.D.'s and psychologists. The Fourth Circuit reversed, 624 F. 2d at 485, stating:

> Forwarned by the decision in *National Society of Professional Engineers, supra*, that it is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'

Even more explicitly, in *In re American Medical Ass'n*, 94 F. T. C. 701, 937 Antitrust & Trade Reg. Rep. E-1, E-9 (1979), *aff'd sub nom, American Medical Ass'n v. F. T.C.*, 638 F. 2d 443 (2d Cir. 1980), *aff'd*, 455 U. S. 676 (1982), where certain of the AMA's ethical canons were challenged, it was stated, on the authority of *Professional Engineers*, that, "[e]thical restraints can be justified under the rule of reason, therefore, only if they promote competition, rather than merely other social goals, and if they are not overly broad." *See also, Havoco of America, Ltd. v. Shell Oil Co.*, 626 F. 2d 549, 554 (7th Cir. 1980) ("The Rule

[of Reason] does not exempt restraints which may be argued to be reasonable or expedient but rather focuses on the reasonableness of the affect of the challenged restraint on competition").

Hence, the instant appeals court decision is at logger-heads with decisions of this Court and other courts that have ruled on the issue.

The Seventh Circuit also erroneously relied on and adopted Justice Blackman's[9] "concurring" opinion in *Professional Engineers.* Pet. App. 33. This minority opinion, on its face, was actually a *dissent* on the critical issue and clearly departs from the controlling majority opinion:

> I join Parts I and III of the Court's opinion and concur in the judgment. *I do not join Part II* because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante,* at 1367, and no. 22, *that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act.*
>
> . . . .
>
> My skepticism about going further in this case by shaping the Rule of Reason to such a narrow last *as does the majority,* arises from the fact that there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering. (Emphasis added.)

Professional Engineers, 435 U. S. at 699-700.

This obvious dissent on the basic issue at hand in *Professional Engineers* emphatically underscores the absoluteness of the majority decision and thus the error of the Seventh Circuit in following the minority opinion.

The Seventh Circuit's reliance on footnote 17 of this Court's decision in *Goldfarb v. Virginia State Bar,* 421 U. S. 773, 787 n. 17 (1975), is equally flawed. In that footnote this Court stated, "The public service aspect, and other features of

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[9] Joined by Justice Rehnquist.

the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."

It is an enormous leap from the general statement to a complete reformulation of the Rule of Reason. In any event, in *Professional Engineers,* the Court rejected the notion that the *Goldfarb* footnote allowed health and safety factors to be weighed as part of a Rule of Reason analysis:

> [T]he cautionary footnote in *Goldfarb,* 421 U. S., at 788-789, n. 17, 95 S. Ct. at 2013, quoted *supra,* cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and accordingly, the nature of the competition in such services may vary. *Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.*

Professional Engineers, 435 U. S. at 696 (emphasis added). The meaning of this passage is clear. If professional canons of ethics on balance promote competition they are lawful. If they on balance injure competition, they are unlawful.

It is clear that the Seventh Circuit succumbed to the urge to create judicial exceptions to the Sherman Act that this Court has ruled are reserved to the legislature. Certainly the undesirability of allowing one state licensed health care profession to "eliminate" or "exclude" another, without recourse to the legislature, should give pause to allowing the Seventh Circuit to overrule the well reasoned decisions of this and other courts.

B. The Court of Appeals Ruling That Petitioners Are Not Entitled to a *Per Se* Instruction Upon Retrial Is in Conflict With the Decisions of This Court and Other Courts of Appeal

This Court has frequently held that certain types of agreements are so "pernicious" within the meaning of the Sherman Act as to be declared unreasonable as a matter of law or illegal *per se.* In those cases, proof of an unreasonable affect

on competition is not required. To this effect, the Supreme Court stated in *Northern Pac. Ry. Co. v. United States*, 356 U. S. 1, 5 (1958):

> Certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

It is beyond dispute that group boycotts or concerted refusals to deal have long been included amongst the category of agreements which are *per se* illegal. *Klors', Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); *Fashion Originators Guild of America, Inc. v. F.T.C.*, 312 U. S. 457 (1941); *United States v. General Motors Corp.*, 384 U. S. 127 (1966); *Associated Press v. United States*, 326 U. S. 1 (1945).

Recently, in *Arizona v. Maricopa County Medical Soc'y*, 457 U. S. 332, 102 S. Ct. 2466, 2473 n. 15 (1982), the Court stated, "Among the practices which the Courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, *group boycotts* and tying arrangements. *Northern Pac. R. Co. v. U.S.*, 356 U. S. 1, 5 [(1958)]."[10] (Emphasis added.)

In *Maricopa County*, the Court also dispelled the notion that *per se* rules could not be applied to the medical profession in the same manner as to other industries. The defendants argued that *per se* rules did not govern that case "because the agreements at issue ... are among members of a profession [and] are in an industry with which the judiciary has little antitrust experience." *Maricopa County*, 102 S. Ct. at 2472. The Court answered, *id.* at 2476-77:

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[10] The applicability of the *per se* rule to certain kinds of coercive activity was again reiterated in *Assoc. Gen'l Contractors of Cal., Inc. v. Cal. St. Council of Carpenters*, ____ U. S. ____, 103 S. Ct. 897, 903-04 (1983) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect").

> We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry.
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> . . . .
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> Finally, the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.' *Northern Pac. R. Co. v. United States, supra,* 356 U.S., at 5, 78 S., Ct. at 518.

Petitioners do not contend that all boycotts are *per se* illegal. Petitioners' position has always been that it is classical horizontal group boycotts intended to eliminate from the market non-group members (i.e., chiropractors) that qualify for *per se* illegality. That position is in keeping with the decisions of this Court, the decisions of other circuit courts of appeal, and even the prior pronouncements of the Seventh Circuit.[11] In *United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.,* 665 F. 2d 781, 788 (7th Cir. 1981) (*en banc*), the court stated:

> As *Smith v. Pro-Football, Inc.,* 593 F.2d 1173, 1178 (D.C. Cir. 1978), notes, the common attribute of *per se* illegal boycotts is a 'concerted attempt by a group of competitors

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[11] See, Jost, *The Joint Commission On Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest,* 24 B. C. L. Rev. 835, 908 (1983) ("Moreover, JCAH standards require a form of hospital medical staff organization that is itself exclusionary. Taking into account these coercive elements, per se analysis might be appropriate both for analyzing the effects of JCAH on the competitors of its physician constituency and the competitors of its hospital constituency.")

at one level to protect itself from competition from non-group members who seek to compete at that level."[12]

This formulation of boycotts that are properly *per se* illegal has been accepted by virtually every other circuit court of appeals that has considered the issue. *See, e.g., Larry V. Muko, Inc. v. Southwestern Pa. Bldg. and Construction Trades Council,* 670 F. 2d 421, 429-31 (3rd Cir. 1982), *cert. denied,* 456 U. S. 1005 (1983); *E. A. McQuade Tours, Inc. v. Consolidated Air Tours Manual Comm.,* 467 F. 2d 178, 186-87 (5th Cir. 1972), *cert. denied,* 409 U. S. 1109 (1973); *Com-Tel, Inc. v. DuKane Corp.,* 669 F. 2d 404, 408-09, 412 (6th Cir. 1982); *Worthen Bank & Trust Co. v. National Bankamericard Inc.,* 485 F. 2d 119, 124-25, 127 (8th Cir. 1973), *cert. denied,* 415 U. S. 918 (1974); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F. 2d 71, 76-80 (9th Cir. 1969), *cert. denied,* 346 U. S. 1062 (1970); *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n,* 707 F. 2d 1147, 1160 (10th Cir. 1983), *cert. granted,* 104 S. Ct. 272 (1984); *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.,* 710 F. 2d 752, 772-75, 778-79 (11th Cir. 1983).

Petitioners introduced evidence that they competed with members of the boycotting group and that the intent of the boycott was to eliminate all chiropractors from the market. Petitioners are thus clearly entitled to a *per se* instruction.

Despite the foregoing, the Seventh Circuit erroneously ruled that respondents' conduct could not be *per se* illegal because, *inter alia,* boycotts are *per se* illegal only if they are used to enforce agreements which are themselves *per se* illegal

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[12] In the cited case, *Smith v. Pro-Football,* 593 F. 2d at 1178, the District of Columbia Circuit Court of Appeals stated, "The classic 'group boycott' is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members .... *It is the purpose to exclude competition that has characterized the Supreme Court decisions invoking the group boycott per se rule.* (Emphasis added, footnotes omitted.) *Accord, Spray-Rite Service Corp. v. Monsanto Company,* 684 F. 2d 1226, 1236 (7th Cir. 1982), *cert. granted,* 103 S. Ct. 1249 (1983).

—such as price fixing. Pet. App. 23. For this remarkable proposition, the court relied only on *Marrese v. American Academy of Orthopaedic Surgeons,* 706 F. 2d 1488, 1495 (7th Cir. 1983).[13] Rehearing *en banc* was granted in *Marrese,* however, and the cited opinion was, therefore, vacated before the Seventh Circuit issued its Opinion in this case.[14] Moreover, a rule requiring double illegality—a boycott is *per se* illegal only if used to enforce a *per se* illegal agreement—is illogical, the epitome of redundancy, and contrary to all prior law.

The Seventh Circuit also held that because the boycott was not meant to compel certain economic conduct toward consumers that no *per se* rule was applicable. Pet. App. 23. Petitioners are aware of no case which has so held, and the statement is flatly contrary to the landmark group boycott case *Klors', Inc. v. Broadway-Hale Stores, Inc.,* 359 U. S. 207, 210-14 (1959). In that case, a group of manufacturers conspired with a retailer to boycott another retailer. There was not even an allegation of an intent to affect how any retailer dealt with consumers. Yet, the boycott was held to be *per se* illegal. *Klor's,* 359 U. S. at 210-14. *See also, Fashion Originators Guild of America, Inc. v. F.T.C.,* 312 U. S. 457, 463-68 (1941).

Finally, the Seventh Circuit erroneously ruled that the respondents' conduct escaped *per se* condemnation due to the evidence of a possible "patient care motive." This disguised "health, welfare and safety" defense is simply contrary to all

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[13] Judge Doyle also cited *United States Trotting Association* for this proposition as had the court in *Marrese.* There is simply no such holding in the *United States Trotting Association* opinion.

[14] A plurality opinion of the Seventh Circuit has subsequently redecided *Marrese* and once again held that only boycotts intended to enforce agreements which are themselves illegal in and of themselves—such as price fixing—are *per se* illegal. *Marrese v. American Academy of Orthopaedic Surgeons,* Nos. 81-2671, 83-8046 (7th Cir., January 3, 1984). If that contention is correct, then only price fixing and conduct intended to enforce price fixing remains *per se* illegal. The holdings of this Court that certain boycotts are *per se* illegal would be dead letter law.

established law. Further, should it become law, it is inconceivable that any group of competitors, e.g.:

orthopaedic surgeons	v. podiatrists
medical physicians	v. osteopathic physicians
medical physicians	v. nurse practitioners
opthamologists	v. optometrists
psychiatrists	v. psychologists
physiatrists	v. chiropractors
orthopaedic surgeons	v. chiropractors
orthopedists	v. chiropractors
radiologists	v. chiropractors
medical physicians	v. chiropractors

who were caught in a classical horizontal group boycott, would ever testify to other than a "patient care" motive for having engaged in the boycott activity. The legislative authority to determine who shall be allowed to practice and the legislative prerogative to best provide for the public health, welfare and safety, would be submerged as juries responded to the "power" and "prestige" of the privileged, older professions. For that reason, the courts have held that a motive to protect public health and safety does not alter the antitrust analysis and will not do so unless the legislature so provides.

In neither *Professional Engineers* nor *Maricopa County* did arguments of good motives save the defendants from *per se* illegality. Moreover, the Supreme Court stated in *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 44 (1930):

> The prohibitions of the statute cannot 'be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results.' Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 [(1912)].

Accord, Fashion Originators' Guild of America, Inc. v. F.T.C., 312 U. S. 457, 467-68 (1941) (boycott held *per se* illegal despite defendants' claim that the conduct was to protect manufacturers, laborers and consumers from "devastating evils").

Respondents' proferred "good motives" cannot save them from *per se* illegality. If they engaged in a group boycott which

was intended to eliminate or exclude horizontal competitors of some of the group from any market, the agreement is *per se* unlawful. Upon retrial, petitioners are entitled to an instruction on *per se illegality.*

C. The Respondents' Efforts to "Fix" the Fact Finding Report of the HEW Expert Review Panel Are Not Exempt From Antitrust Coverage By the *Noerr-Pennington* Doctrine

There can be little doubt that a conspiracy by competitors to exclude a rival through abuse of regulatory and judicial processes "is inconsistent with free-market principles embodied in the Sherman Act. . . ." *United States v. General Motors Corp.*, 384 U. S. 127, 146 (1966). Such "[p]redation by abuse of governmental procedures," R. Bork, *The Antitrust Paradox* 347 (1978), can never benefit competition and transfers from public to private hands the power to limit competition. *Fashion Originators' Guild of America, Inc. v. F.T.C.*, 312 U. S. 457, 465 (1941).

With the health care industry accounting for 10.5% of the nation's gross national product, or approximately $322 billion, it is particularly sensitive to fraudulent misuse or abuse of expert investigative bodies whose reports are needed by the Executive and Legislative Branches of Government.

The Court of Appeals for the District of Columbia recognized the inherent anticompetitive nature of actions that undermine fact finding determinations. "No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." *Israel v. Baxter Laboratories, Inc.*, 466 F. 2d 272, 278 (D. C. Cir. 1972).

This Court severely circumscribed *Noerr-Pennington* in *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 510, 512-13 (1972) (emphasis added):

> Yet unethical conduct in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to

exclude a competitor from the market may involve a violation of the antitrust laws, as we held in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 175-177, 86 S.Ct. 347, 349-350, 15 L.Ed.2d 247. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777; Harman v. Valley National Bank, 339 F.2d 564 (CA9 1964). Similarly, bribery of a public purchasing agent may constitute a violation of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (CA9 1965).

There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which *leads the factfinder* to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. *But once it is drawn, the case is established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts.* Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'

Notwithstanding substantial evidence (see supra pp. 9-10) of respondents' "fix" of an Expert Review Panel Report that served as the basis for the HEW Secretary's Report to Congress on the "need" for inclusion of chiropractic services in Medicare, the court of appeals believed that this aberrant conduct was excused by the *Noerr-Pennington* doctrine. Pet. App. 38-39. The court opined that the respondents' actions were excused if "the defendants undertook such efforts to influence govern-

mental bodies with a sincere purpose to obtain the governmental actions that they sought." Pet. App. 39.[15]

From this instruction, buttressed by the supplemental instruction quoted below in footnote 15, it is obvious that the "factfinder" referred to in *California Motor Transport* is met by an absolute bar to consideration of fraud or inequitable conduct that perverted the Fact Finding Body and prevented meaningful access to that group or to HEW which was dependent on the "corrupted" Report.

Certainly there can be no insulation from antitrust accountability for fraud practiced on an expert review panel or agency merely because the perpetrators are sincere in trying to defraud the agency, legislature or other governmental body. For example, certainly those who defraud the Patent Office to obtain a patent monopoly are "sincere" in their efforts to obtain the patent but are not insulated from antitrust consequences for their actions. *Walker Process,* 382 U.S. 172 (discussed in the quote from *California Motor Transport,* supra, p. 27.)

Such fraud and inequitable conduct in this case effectively barred petitioners and their agents from access to the Fact Finding Body or governmental department involved. "Insofar as the administrative or judicial processes are involved, action of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.' " *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972).

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[15] The total inappropriateness of this instruction is underscored when read in conjunction with instruction A45 (Respondents' *uu*) also given by the trial court:

> *Regardless of the means which may have been employed by any of these defendants* to influence state or federal legislation or to advocate their position to government agencies or officials, it is not a violation of the antitrust laws if the defendants employing these means actually wanted the government agency or official to take action which might adversely affect or injure chiropractors.

Pet. App. 60 (emphasis added). It should be obvious that the appeals court has totally misconstrued *California Motor Transport.*

The court of appeals' ruling is simply unsuitable for the insidious, covert actions of respondents in undermining petitioners' access to the Fact Finding Body, HEW, and the Congress.

VII. CONCLUSION

The appeals court opinions grant quasi-governmental authority to unelected medical professional societies and trade associations to conspire[16] to restrain competition with state licensed chiropractors operating within the scope of their state licenses and to exclude chiropractors from otherwise legal markets where competition would normally take place.

The opinions set forth rules of law that are in direct conflict with prior decisions of this Court and with other circuits.

The Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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[16] Said the court of appeals, Pet. App. 51:

Based on the pleadings, on all the motions which had previously been filed (including motions for summary judgment), and on 'everything that the court has considered in this case,' the district court determined that there was evidence that there had been 'a conspiracy among all of the defendants,' and that this evidence was sufficient to permit use against all of the defendants of statements made by any of them in furtherance of the conspiracy.